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Maternity Leave Laws in the United States in the Light of European Legislation

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Chapter 7
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A comparison of maternity (and paternity) leave laws in the United States and the European Union could be stated in two phrases: United States, not much; European Union, a lot. Countries in the European Union and in much of the world provide lengthy paid maternity leaves and some paternity leaves. Although many companies in the United States provide their workers with paid family leaves, many do not. United States law does not require or fund paid family leaves. This makes it difficult for workers in the United States to balance family concerns with work.

The difference between how the United States and the countries in the European Union provide family leave benefits raises questions in the context of "internationalization." Internationalization suggests information-sharing across borders. With increased information, countries and companies acquire new ideas, or learn more about "foreign" ideas. "Good" ideas can be borrowed from one country and adapted to fit the needs of another. Internationalization also suggests increased interaction between countries. Because there is such a discrepancy between the United States and the countries of the European Union (and other parts of the world) in how the governments handle social needs, one wonders why the U.S. stands alone and whether its policies affect international interactions, including trade, between the United States and the European Union.

Perhaps the United States will not continue to stand alone. During the first half of the twentieth century, the United States Supreme Court shifted from striking down laws that regulate workers' wages and hours, to upholding them. In opinions reflecting more concern for workers, it occasionally looked to European laws already in place. Although considerable resistance remains in the United States to laws that regulate the workplace, the United States has slowly enacted laws to provide some social benefits and to prohibit discrimination in the workplace. In recent years the Supreme Court

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has upheld these laws, although not without dissent. Perhaps this trend will continue. Perhaps the United States will look to the European Union, and internationalization will have a role in softening United States resistance to governmentally required or provided paid family benefits for workers. On the other hand, that resistance is deeply entrenched.

One can see the competing values invoked by United States proponents and opponents of laws that regulate the workplace by looking at Supreme Court cases that strike down or uphold those laws. Since the Supreme Court has the power to invalidate acts of Congress on the ground that they violate the Constitution,[1] much social legislation in the United States gets challenged in the Supreme Court. This discussion will describe the difficulty that the United States has had in passing social legislation by viewing it through the eyes of the United States Supreme Court during five different eras in the twentieth century: Laissez-faire economics and wage and hour legislation, 1905–1941; President Franklin D. Roosevelt's "New Deal" Social Security Act, 1935–1937; World War II and employment legislation, 1940–1948; the Civil Rights and Women's movements and employment legislation, 1963–1978; and, the Family and Medical Leave Act of 1993. This study will conclude with questions raised by viewing domestic United States policy in the context of "internationalization" as described by the other chapters in this volume. This comparison guides the author's conclusions, which were influenced by this discussion.

7.1 Laissez-Faire Economics and Wage and Hour Legislation, 1905–1941

In the early twentieth century when the United States Supreme Court was striking down laws that regulate hours and wages of workers, at least some European countries already had those laws in place. As the Supreme Court began to change its view about such legislation, it gave an occasional glance toward European laws. Before that change, however, the divergence in attitudes about social legislation was illustrated by *Lochner v. New York*,[2] one of the early cases dealing with governmental regulation of working conditions that reached the United States Supreme Court.

In *Lochner* the State of New York had passed a law preventing bakery owners from requiring employees to work for more than 10 hours a day or 60 hours a week. It was enacted after studies had shown serious danger, and more danger than in most occupations, to workers from long hours in bakeries. A bakery owner in New York who had been indicted for having violated New York's law argued that it violated the Due Process clause of

[1] *See* Marbury v. Madison, 5 U.S. 137 (1803).
[2] Lochner v. New York, 198 U.S. 45 (1905).

the Fourteenth Amendment to the U.S. Constitution. That clause prohibits states from depriving "any person of life, liberty, or property without due process of law."

Although the New York courts agreed with the state's legislators that the law was valid,[3] the Supreme Court disagreed, having reviewed the case because the bakery owners' challenge to the law was under the United States Constitution. The Court said that a state's police power to protect its citizens was not unlimited. The Court, applying its "common understanding" of the workplace, asserted that "the trade of a baker has never been regarded as an unhealthy one."[4] Perhaps reflecting the "rugged individualism" often associated with United States' policies, the Court invoked "the right of the individual to his personal liberty interest,"[5] holding that an employee had the freedom to contract with an employer to work as many hours as he wanted to support his family. Almost as an aside, the Court noted that, "Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor,"[6] thus dispensing with the suggestion that workers, needing jobs and having little leverage, require protection from employers. Again emphasizing individuality, the Court said,

> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.[7]

Justice Harlan, dissenting in *Lochner* viewed the case differently. In contrast to the Court's view of the equal relationship between employee and employer, he said,

> It may be that the statute had its origin, in part, in the belief that employers and employes [*sic*] in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor.[8]

He then asserted that the Court should not be "concerned with the wisdom or policy of legislation"[9] as long as the law had a substantial relationship to a lawful purpose, in New York's case, to protect health. His view

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[3] Id. at 57.
[4] Id. at 59.
[5] Id. at 56.
[6] Id.
[7] Id. at 57.
[8] Id. at 69.
[9] Id.

did not prevail. Thus, in 1905, rugged individualism triumphed over state protection.

State protection triumphed three years later, but only for women. Oregon had passed a law that prohibited employers in a "mechanical establishment, or factory, or laundry" from employing women for more than 10 hours a day. The owner of a laundry was convicted of having violated the law. He challenged its constitutionality in a case that reached the U.S Supreme Court, *Muller v. Oregon*.[10] The Court distinguished *Lochner* on the ground that women were different from men, frail and in need of protection. The unanimous Court explained,

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
>
> Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present . . .Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. . . .. [S]he is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. . . .The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all.[11]

While initially hailed as a progressive decision allowing states to begin to regulate sweatshop working conditions, it backfired on women, making them less desirable and valuable employees because they could not work as long as men could. In addition, the Court's demeaning language justified the view that women were inferior workers.

Muller led to a debate that continues to the present, whether laws that are written only for women can ever be advantageous to them, even when those laws deal with conditions biologically and indisputably unique to them, such as pregnancy and breastfeeding. The competing views in the debate are known as "equal treatment" versus "special treatment" or "equal opportunity." Whether one chooses the "special treatment" or "equal opportunity" title at times dictates the outcome of the debate: "equal

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[10] Muller v. Oregon, 208 U.S. 412, 417 (1908).

[11] Id. at 421–422.

opportunity" being preferred by its proponents, equality having special place in United States law and policy.[12]

Having upheld maximum hour laws for women in *Muller*, the Court upheld that protection for men nine years later. In 1917 *Bunting v. Oregon*[13] upheld a maximum hour law for both men and women. In upholding the law, the Court never mentioned *Lochner*'s freedom-of-contract-due-process analysis although the lawyer representing Bunting, who had been convicted for having violated the law, relied upon it. Apparently the arguments of future Justice Felix Frankfurter, representing Oregon, convinced the Justices to ignore *Lochner*. Frankfurter argued in *Bunting* that *Lochner*'s reasoning was outmoded as it had been based, not on "scientific scrutiny" or "authoritative interpretation of accredited facts" but on the Justices' "common understanding"[14] of working conditions. The Court in *Bunting* upheld the hours law, quoting with approval from the Oregon Supreme Court's opinion,

> "In view of the well-known fact that the custom in our industries does not sanction a longer service than 10 hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor."

To add justification to its holding, the Court quoted further from the Oregon Supreme Court's opinion:

> "Statistics show that the average daily working time among working-men in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, 9 3/4; in Denmark, 9 3/4; in Norway, 10; Sweden, France, and Switzerland, 10 1/2; Germany, 10 1/4; Belgium, Italy, and Austria, 11; and in Russia, 12 hours."[15]

For the first time in the Supreme Court's consideration of maximum hour laws, "internationalization" had a role.

Although in *Bunting* the Supreme Court had upheld laws regulating hours for both men and women, it continued to be leery of state legislation that interfered with employers' decisions. This was still a time of *laissez faire* economics in the U.S. Five years after *Bunting* was decided, the Court in *Adkins v. Children's Hospital*,[16] in 1923, struck down a law passed by Congress for the District of Columbia that required employers to pay at least a minimum wage to women and children.[17] Although fifteen years prior in *Muller* the Court had said that "it is still true that in the struggle for subsistence she is not an equal competitor with her brother," the Court in *Adkin*s did not equate wage laws with health or, apparently, "subsistence." Rather, noting the passage of the Nineteenth Amendment,

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[12] *See* Fourteenth Amendment to the United States Constitution ("nor shall any State . . .deny to any person . . .the equal protection of the laws"..).

[13] Bunting v. Oregon, 243 U.S. 426 (1917).

[14] *Bunting*, 243 U.S., at 432.

[15] Id. at 438–439.

[16] Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[17] Congress was responsible for the District of Columbia, the capital of the United States.

which gave women in the United States the right to vote, the Court said that, except for physical differences, inequalities between men and women had "come almost, if not quite, to the vanishing point."[18]

Although the Court had not cited *Lochner* in its earlier decision in *Bunting*, in *Adkins* the Court revived *Lochner* and its freedom-of-contract-liberty-interest analysis, saying,

> [W]hile the physical differences [between men and women] must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.[19]

The Court thus articulated, in the context of minimum wage legislation, part of the "equal treatment/special treatment" debate that had begun after *Muller* had upheld maximum hour legislation for women. In *Adkins* the Court chose the "equal treatment" side of the debate. Apparently limiting hours, and in doing so decreasing women's wages, was one thing, but increasing their wages was something else entirely.

Chief Justice Taft in his dissent in *Bunting* pointed out that the Court's reasoning disadvantaged women by creating unequal opportunities, for the legislators who enacted the minimum wage law for women might have assumed that "the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered."[20] Felix Frankfurter, who had been counsel to Oregon in *Bunting*, and was counsel for the District of Columbia in *Adkins*, had argued that Congress' findings from its hearings supported the law's rationality. Congress, he said,

> found that alarming public evils had resulted, and threatened in increasing measure, from the widespread existence of a deficit between the essential needs for decent life and the actual earnings of large numbers of women workers of the District. In the judgment of Congress, based upon unchallenged facts, these conditions impaired the health of this generation of women and thereby threatened the coming generation through undernourishment, demoralizing shelter and insufficient medical care. . . .The purpose of the act was to provide for the deficit between the cost of women's labor, i.e., the means necessary to keep labor going – and any rate of women's pay below the minimum level for living, and thereby to eliminate all the evils attendant upon such deficit upon a large scale.[21]

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[18] *Adkins*, 261 U.S., at 553.
[19] Id.
[20] Id. at 562, (Taft, C.J., dissenting).
[21] *Adkins*, 261 U.S., at 528–529.

Justice Oliver Wendell Holmes, in his dissent in *Adkins*, pointed to minimum wage laws in Great Britain, "Victoria" (Canada) and Australia as evidence of the reasonableness of such laws.[22] Thus, Justice Holmes used "internationalization" to dispute the reasoning of the majority. His arguments eventually prevailed when the Supreme Court, in *West Coast Hotel Co. v. Parrish*,[23] overruled *Adkins* and its reliance on *Lochner* fourteen years later in 1937.

West Coast Hotel applied the reasoning of *Muller*, which had upheld maximum hour legislation for women, to a minimum wage law for women that had been passed in the State of Washington. The Court held,

> What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition.[24]

One year after the Court had decided *West Coast Hotel*, Congress passed the Fair Labor Standards Act, which prohibited employers in specified industries from employing child labor and required them to pay, to both men and women, a minimum wage and an extra wage for work over 40 hours per week.[25] This was the first time a wage and hour law was enacted by the federal government to govern employers in all of the states.

With Felix Frankfurter, who had successfully represented Oregon in *Bunting* and unsuccessfully represented the District of Columbia in *Adkins*, now on the Supreme Court, the Supreme Court upheld the constitutionality of the FLSA in 1941 in *United States v. Darby*.[26] In *Darby* a manufacturer of finished lumber was indicted for selling it across state lines without having paid his workers the minimum wage or extra wage for overtime work.[27] Most of the Court's unanimous opinion in *Darby* was devoted to explaining why the federal government had power under the Commerce Clause of the United States Constitution to regulate actions of state employers. The court addressed the issue, which had elicited so much discussion in prior years,

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[22] Id. at 570–571, (Holmes, J., dissenting).
[23] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
[24] Id. at 398–399.
[25] 29 U.S.C. §201 *et. seq*.
[26] United States v. Darby, 312 U.S. 100 (1941).
[27] Id. at 111.

whether the government could protect workers with wage and hour laws, in three sentences,

> Since our decision in *West Coast Hotel Co*. v. *Parrish*, 300 U.S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. . . .*Muller* v. *Oregon*, 208 U.S. 412; *Bunting* v. *Oregon*, 243 U.S. 426. . . .Similarly the statute is not objectionable because applied alike to both men and women. Cf. *Bunting* v. *Oregon*, 243 U.S. 426.[28]

Lawyers from the United States commonly use the abbreviation "cf." ("confer") as a signal that the cited case does not stand exactly for the proposition for which it is being cited, but could be relevant. *Bunting*, "cfed" in this way by the Court, had upheld maximum hour laws for men and women, but had avoided the question whether minimum wage laws for men and women, previously upheld only for women in *West Coast Hotel*, would be constitutional. *Darby* decided that they were, with little comment.

As described above, the debate about the validity of wage and hour laws continued from 1905 until 1941. While wage and hour laws regulate employers' decisions about those matters, they do not provide governmental benefits directly to workers. Before the FLSA had been passed and the wage hour debate had ended, after Roosevelt had been elected and with the Great Depression worsening, the federal government passed the Social Security Act of 1935, which would involve the federal government in providing benefits directly to individuals.[29]

7.2 President Franklin D. Roosevelt's "New Deal" Social Security Act

The Social Security Act of 1935, a major federal program to deal with a major national depression, created a number of programs. It provided retirement benefits (Old Age Assistance) for working men and federal unemployment benefits to be funded by taxing employee wages. While the old age assistance would be administered entirely by the federal government, the unemployment benefits would be administered by the states under federal supervision. The Social Security Act also authorized the federal government to provide grant money from its general tax revenues to states so

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[28] *Darby*, 312 U.S., at 125.

[29] Wilbur J. Cohen, *Symposium: The New Deal and its Legacy: The Development of the Social Security Act of 1935: Reflection Some Fifty Years Later*, 68 Minn. L. Rev 379, 382–383 (1983). Wilbur Cohen is regarded as among the principal architects of the Social Security Act.

that they could administer aid to needy dependent children and the needy elderly and blind.[30]

When the Social Security Act was passed in 1935, the Supreme Court had yet to decide *West Coast Hotel v. Parrish*, which would overturn *Adkins v. Children's Hospital*.[31] In *Adkins*, twelve years prior to the passage of the Social Security Act, the Supreme Court had invalidated the District of Columbia's minimum wage law for women and revived *Lochner*'s freedom-of-contract-as-liberty-interest under the Due Process Clause of the Constitution. Although the minimum wage act at issue in *Adkins* had been passed by Congress, the act was not a federal law in that it applied to the entire country; rather, it was an act passed pursuant to Congress's role of governing the District of Columbia, the capital of the United States. Thus, all the wage/hour cases up to that time had involved federal Constitutional challenges to state, or quasi-state in the case of the District of Columbia, laws. As described above, many of these state statutes had been struck down by the Supreme Court. Ironically, the Social Security Act was challenged in the courts on the ground that it violated the "state's rights" provision of the United States Constitution, the Tenth Amendment.

The Tenth Amendment was the last of the amendments that were added in 1791 to the Constitution, which had been ratified in 1789. It provided that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The challenges to the Social Security Act were heard in two cases: *Steward Machine Company v. Davis*[32] resolved the challenge to the unemployment benefits program of the Act, while *Helvering v. Davis*[33] resolved the challenge to the retirement benefits program. Because the programs were to be funded by wage reductions (taxes) from employees' pay, the suits were brought nominally against Davis, who was the Collector of Internal Revenue. In both cases the opinions were written by Justice Benjamin Cardozo and announced on the same day in May of 1937, only two months after the Court decided *West Coast Hotel v. Parrish*.

In *Steward Machine* and *Helvering*, Justice Cardozo rejected the Tenth Amendment challenges by describing the national nature of the Great Depression.

> [T]here is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. *West Coast Hotel Co*. v. *Parrish*, 300 U.S. 379. . . .During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents.

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[30] Id.

[31] *Adkins*, 261 U.S. 525.

[32] Steward Machine Company v. Davis, 301 U.S. 548 (1937).

[33] Helvering v. Davis, 301 U.S. 619 (1937).

> Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. . . .[34]

The Justices in dissent were outraged. Justices McReynolds said, "The doctrine thus announced and often repeated [the right of self-government, by the States], I had supposed was firmly established. . . .. Unfortunately, the decision just announced opens the way for practical annihilation of this theory. . . ."[35] Justice Sutherland, joined by Justice Van Devanter, said, "The threat implicit in the present encroachment upon the administrative functions of the states is that greater encroachments. . . .will follow."[36] Finally Justice Butler said, "The terms of the measure make it clear that the tax and credit device was intended to enable federal officers virtually to control the exertion of powers of the States in a field in which they alone have jurisdiction and from which the United States is by the Constitution excluded."[37]

In *Helvering* Justice Cardozo reiterated the theme of national calamity,

> Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times.
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> The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from State to State, the hinterland now settled that in pioneer days gave an avenue of escape. . . .Spreading from State to State, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the Nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co., supra*, has set the doubt at rest. But the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.[38]

Considering the *laissez faire* economics that prevailed in American political thought in the early part of the twentieth century, and the Supreme Court's insistence that it was embedded in the Constitution, the adoption and judicial upholding of the both the Social Security and the Fair Labor Standards Acts were monumental changes. Many compromises were

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[34] *Steward Machine*, 301 U.S., at 586–587.
[35] Id. at 599 (McReynolds, dissenting).
[36] Id. at 616 (Sutherland, dissenting).
[37] Id. at 618 (Butler, dissenting).
[38] *Helvering*, 301 U.S., at 641–644.

required to produce bills that could pass in Congress. As Professor Wilbur Cohen, who was one of the drafters of the Social Security Act and Secretary of Health, Education and Welfare (HEW) under President Johnson, said of the Social Security Act,

> Although the Act was viewed as a radical program by some conservatives and viewed as a conservative one by some liberals, many political figures looked upon it as a middle-of-the-road program designed to preserve the social and economic structure of the nation, struggling in the midst of the most severe economic depression the republic had ever encountered. Thus, some individuals vigorously opposed the program, most others welcomed it, and others, while critical of some aspects, acknowledged that it was probably the best compromise available at the time within the structure of a capitalistic, free market economy and a democratic, representative legislative system.[39]

One bill that had competed with the Social Security Act's unemployment provisions bears mentioning here because it would have provided maternity benefits. The Workers' Unemployment and Social Insurance Bill was modeled, at least in part, on European practices. As Professor Kenneth Casebeer describes, its "benefits were to be administered through European style workers' councils."[40] The Workers' Bill would have provided for "a system of unemployment and social insurance for the purpose of providing insurance for all workers and farmers unemployed through no fault of their own in amounts equal to average local wages" and for "the establishment of other forms of social insurance . . .for the purpose of paying workers and farmers insurance for loss of wages because of part-time work, sickness, accident, old age, or maternity."[41] Ahead of its time, the Workers' Bill also provided that it "shall be extended to workers and farmers without discrimination because of age, sex, race, or color, religious or political opinion, or affiliation, whether they be industrial, agricultural, domestic, or professional workers, for all time lost."[42]

At various hearings before and after the passage of the Social Security Act, Congress heard about the need for maternity benefits. Dr. Emily N. Pierson testified:

> There are in the United States 2,425,000 married women of child-bearing age (18–45 years) gainfully employed in the United States. One in every five workers is a woman, and of these, one in every four is married. . . .[There is] a very close relation between economic security and the maternal mortality rate. The other

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[39] Cohen, *supra* n. 29, at 382–383 (1983).

[40] Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organizaiton and Legal Ideology*, 35 B.C. L. Rev 259, 266 (1994).

[41] Workers' Unemployment and Social Insurance Bill *quoted in* Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organizaiton and Legal Ideology*, 35 B.C. L. Rev 259, 296–297 (1994).

[42] Id.

> causative factors, such as the quality and availability of medical care, do not alter this fact.[43]

Ella Bloor testified:

> I think very few of us who are in the cities realize the poverty that the women are suffering, especially the young women in the farm districts, on account of not only the drought and the usual conditions there, but especially the fact of maternity in these isolated places. . . .We found in the women's section of the unemployed congress which took place in Washington recently, when I met with those women two or three times, that they were especially interested in this part of the bill, about maternity . . .not only the farm women, but working women everywhere.[44]

Whether maternity benefits might have received consideration in another bill cannot be known. The fact that those benefits were included in a bill with a funding mechanism most likely viewed as radical at the time may not have helped. The Workers' Bill provided:

> Funds for such insurance shall hereafter be provided at the expense of the Government and of employers, and . . .funds to be raised by the Government shall be secured by taxing inheritance and gifts, and by taxing individual and corporation incomes of $ 5,000 per year and over. No tax or contribution in any form shall be levied on workers for the purposes of this Act.[45]

No doubt this funding mechanism would have faced opposition, especially from those who still retained not only ardent states rights views, but also *Lochner*-type views of the employer-employee relationship. As Professor Cohen described, the funding mechanism of the Social Security Act was an important mechanism to maintain its political viability. Professor Cohen observed that,

> Roosevelt was very concerned about the possible political change or repeal of the old age insurance program in the future. Thus, he supported and justified the use of contributory payroll taxes to finance the insurance programs as "the" method that would assure continuation and support of a statutory and political "right" of individuals to receive benefits without an income or "needs" test in time of financial constraints.
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> At the time he signed the Social Security Act into law, President Roosevelt explained his basic incremental approach when he said that the Social Security Act "represents a corner stone in a structure which is being built but is by no

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[43] Social Insurance: Hearings on S. 3475 Before the Senate Comm. on Education and Labor, 74th Cong., 2d Sess., 56–57 (1936) (statement of Dr. Emily N. Pierson) *quoted in* Workers' Bill quoted in Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organizaiton and Legal Ideology*, 35 B.C. L. Rev 259, 294 (1994).

[44] Unemployment, Old Age, and Social Insurance: Hearings on H.R. 2827 Before Subcomm. of the House Comm. on Labor, 74th Cong., 1st Sess., 129–30 (1935) (statement of Ella Reeve Bloor) *quoted in* Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organizaiton and Legal Ideology*, 35 B.C. L. Rev 259, 294 (1994).

[45] Workers' Unemployment and Social Insurance Bill *quoted in* Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organizaiton and Legal Ideology*, 35 B.C. L. Rev 259, 296–297 (1994).

> means complete." The building of the program has been a continuing process which Roosevelt expected to go on until the program provided protection against all the major hazards of life "from the cradle to the grave."[46]

Although many countries in the European Union and elsewhere had and have "cradle to grave" protections for their people, Roosevelt's expectation of what would happen in the United States has not taken place. Little by little, however, the Social Security Act has expanded. In 1939 it was amended to add survivors' and old-age benefits for wives and widows of workers covered by Social Security and in 1950 to provide those benefits to husbands and widowers.[47] It was amended again in 1956 to include disability insurance and in 1965 to include Medicare, a medical insurance program for those of retirement age.[48] In 1977 the Supreme Court had occasion to review the 1939 amendment and said that "dependency, not need, [was] the criterion for inclusion" of wives and widows.[49] That the "old age" benefits were not to be based on need emphasizes the political exigency that required the Social Security Act, and its later amendments, to be an insurance based plan, not a "general welfare" plan.[50]

7.3 World War II and Employment Legislation, 1940–1948

Maternity benefits never became part of the Social Security Act, nor were they provided in federal legislation until more that 50 years later. As will be discussed below, the Family and Medical Leave Act, passed in 1993, was the first federal statute to provide parental leave and health related leaves, although they are unpaid, for no more than 12 weeks and are only required to be given by large employers. By this time European countries, and most of the countries in the world, provided paid, and usually lengthy, maternity leaves, frequently funded at least in part with general taxes, not taxes solely on workers' wages. Often those countries provide paternity leaves as well.

Although during the New Deal Congress passed much social legislation, the only legislation related to leaves from work involved veterans. Before the United States entered World War II at the end of 1941, Congress had passed the Selective Training and Service Act of 1940, which provided that private employers "shall restore" former employees, who were honorably

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[46] Cohen, *supra* n. 29, at 407.

[47] Califano v. Goldfarb, 430 U.S. 199, 216 (1977).

[48] Edward D. Berkowitz, Mr. Social Security: The Life of Wilbur J. Cohen (forward by Joseph A. Califano).

[49] *Goldfarb*, 430 U.S. at 213 (holding that differential survival benefits for widows and widowers violated the Constitution).

[50] While the Social Security Act did provide federal grants to the states for welfare for the needy, general funding for welfare has less political support than insurance-type benefits in the U.S. *See* Cohen, *supra* n. 29 at 406.

discharged, to their former "position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."[51] Congress has extended that Act many times. It is currently known as the Uniformed Services Employment and Reemployment Rights Act.[52] As with prior acts, it provides employment leaves for veterans for up to 5 years.[53] When veterans return they are entitled to receive the wages, benefits and seniority they would have had as if they not been in the service.[54] When there was a draft, the veterans' leave and benefits applied to those who volunteered as well as to those who were drafted.[55] For veterans returning from World War II Congress passed the "GI bill", which paid for veteran's post high school education. During World War II, not only were maternity benefits not legislated, but at least one state had passed legislation that excluded women from certain jobs. A law passed in Michigan in 1945 prohibited women from having jobs as bartenders unless they were the wife or daughter of a male owner. The law was challenged as violating the Equal Protection Clause of the Constitution.[56] The Supreme Court upheld it in *Goesaert v. Cleary*[57] although there were three dissenters. Apparently not taking the issue seriously, Justice Frankfurter in his majority opinion wrote, "Beguiling as the subject is, it need not detain us long. . . .We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald, in Shakespeare, . . ."[58] The Court held that the distinction in the Michigan law was rational and concluded, "Since the line they [in Michigan] have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."[59] As the case was decided in 1948, one might ask whether this lack of chivalry was related to the fact that men were returning from war.

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[51] *See*, Accardi v. Pennsylvania Railroad Co., 383 U.S. 225 (1966), *quoting* the Selective Training and Service Act of 1940.

[52] 38 U.S.C. §4301, *et seq*.

[53] 38 U.S.C. § 4312.

[54] 38 U.S.C. §4316 (a) provides, "A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed."

[55] Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §2021 et seq., 38 U.S.C. §§2021, 2024. *See also* Schaller v. Board of Education of Elmwood Local School District, 449 F. Supp. 30 (W.D. Ohio 1978).

[56] The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides "nor shall any State . . .deny to any person . . .the equal protection of the laws".

[57] Goesaert v. Cleary, 335 U.S. 464 (1948).

[58] Id. at 465.

[59] Id. at 467.

Historians differ as to the effect of World War on women's desire for work outside the home. Some view it as a time when women indicated a distaste for employment, illustrated by a popular, although mixed metaphor, that at the end of the war could be heard "the thundering herds of women stampeding back to the nest."[60] Others refer to the famous poster of "Rosie the Riveter" as ushering in a time when women realized that they were capable of handling work outside the home and enjoying it.[61] Such debates may not have been as pronounced in Europe as so many men had been lost during the war.

7.4 The Civil Rights and Women's Movements, Employment Legislation, 1963–1978

Very little, if any, federal legislation aided women who wanted or needed employment until the early 1960s. As a result of the Civil Rights and Women's movements, two important acts were passed. In 1963 Congress passed the Equal Pay Act, which amended the Fair Labor Standards Act to require employers to pay men and women the same rate for equal work of similar skill, effort and working conditions.[62] One year later Congress passed the Civil Rights Act of 1964, Title VII of which prohibited employers from discriminating against workers because of their race, religion, sex, national origin and color.[63] About a decade after Title VII was passed, the Supreme Court ruled in two cases that discrimination against pregnant women was not sex discrimination. *Geduldig v. Aiello*[64] involved a constitutional challenge to California's disability insurance program that covered all short term disabilities except pregnancy. The Court ruled that because there were women in both classes of pregnant and nonpregnant people, discrimination against pregnancy was not sex discrimination. *General Electric Co. v. Gilbert*,[65] involved a Civil Rights Act of 1964 Title VII challenge to an employer's plan similar to California's. The Court applied the same reasoning and also noted that the company was paying more in benefits to women than to men.

Congress, in response, amended Title VII with the Pregnancy Discrimination Act (PDA) of 1978, which provided:

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[60] *See, e.g.*, EEOC v. Madison Community Unit School Dist., 818 F.2d 577, 582 (1982) (quoting Congressman Goodell, 109 Cong. Rec. 9208 (1963)).
[61] *See, e.g.*, Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 24 (Poche, J., dissenting).
[62] 29 U.S.C. § 206(d).
[63] 42 U.S.C. §2000e, *et seq*.
[64] Geduldig v. Aiello, 417 U.S. 484 (1974).
[65] General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work[66]

Pregnancy issues challenge the concept of equality. If an employer provides no benefits except those for pregnant women, women may be viewed as less desirable workers than men, and may also be resented by their colleagues. If an employer provides no benefits to anyone, then women are not singled out. If they need time from work for pregnancy, however, they will lose their job while men who become fathers will not. Thus, there is no way to be "equal" because men and women's reproductive abilities are not the same. Of course an individual woman could decide not to become pregnant, but that would not be a beneficial resolution of the debate from a societal point of view.

The PDA can be read as having both equal opportunity and equal treatment clauses. The first clause defining discrimination, does not specify whether discrimination is equal treatment or opportunity. The second clause, in the context of offering benefits, uses explicit "treated the same" language in the context of pregnancy. The "equal treatment/special treatment or equal opportunity" debate surfaced during the wage and hour legislation debate. During that time, no matter how the debate was resolved, women were disadvantaged. The Court in *Muller*[67] allowed Oregon to provide women with "special treatment" by upholding a state's maximum hours legislation. As noted earlier, although that legislation was designed to end some of the sweatshop conditions, it backfired against women. Later in *Adkins*[68] the Court refused to let the District of Columbia provide women with the "special treatment" of a minimum wage for them. The Court invalidated the law on the ground that women should not be treated differently from men. After *Muller*, women received lower wages than men; after *Adkins*, women continued to receive lower wages.

Countries in the European Union generally do not adopt the "equal treatment" model of equality. Rather, their family leave laws frequently provide lengthier leave for women than for men. This disparity in leaves is criticized by some as perpetuating the distinction between men's and women's jobs, but praised by others as enabling mothers to both keep their jobs and have meaningful time with their newborns.

As in the 1910s, in the 1960s and 1970s some states passed their own employment laws. California passed a law requiring employers to provide women with up to four months of unpaid leave for disability caused by

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[66] 42 U.S.C. §2000e(k).
[67] Muller v. Oregon, 208 U.S. 412 (1908)
[68] *Adkins*, 261 U.S. 525.

pregnancy. An employer challenged this law on the ground that it was preempted by Title VII, a federal statute which, under the Supremacy Clause of the Constitution, invalidates any state statute that interferes with it. In *California Federal Savings & Loan Assn. v. Guerra*,[69] the employer relied on the "treated the same" language of the PDA, arguing that because California did not require employers to provide up to four months of leave to "other persons not [affected by pregnancy] but similar in their ability or inability to work," the California law interfered with Title VII. Feminists filed *amicus curiae* briefs on both sides of the case. The "equal treatment" feminists sided with the bank, while the "equal opportunity" feminists sided with California, which was defending its statute.[70] The majority, in an opinion by Justice Thurgood Marshall, held in *CalFed* that "Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise.' "[71] Sounding as if he were adopting the "equal opportunity" approach to Title VII, Justice Marshall also said, "By 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs."[72] He did not say, however, that Title VII requires pregnancy-specific policies to be provided, no matter what programs an employer does or does not provide, to ensure that women do not have to choose between families and jobs. To have said that would have been difficult as the legislative history to the PDA contained specific statements that it did not require employers to provide benefits if they were not doing so.[73] The federal government's reluctance to tell employers what to do was still present.

Justice White, for the dissent in *CalFed*, quoted that legislative history, which was from the House Report, and noted that it did not change the antidiscrimination focus of Title VII and did not give women preferential treatment.

> It must be emphasized that this legislation, *operating as part of Title VII*, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. H. R. 6075 in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.[74]

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[69] California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272 (1987).

[70] Id. at 274. *See also* Candace S. Kovacic[-Fleischer], *Remedying Underinclusive Statutes*, 33 Wayne L. Rev. 39, 76–80 (1986).

[71] *CalFed*, at 285, *quoting from* the Ninth Circuit's opinion.

[72] Id. at 289.

[73] Id. at 286–287 and at 299 (White, J., dissenting).

[74] Id. at 299 (White, J. dissenting).

CalFed did not resolve the equal treatment/equal opportunity debate. It held only that states may provide pregnant women with extra benefits for physical disabilities from their unique condition. It did not say that those benefits *must* be provided if women are to achieve equality in the workplace.

One can see the ghost of *Lochner* in the way courts have interpreted the second clause of the PDA, the clause requiring pregnant women merely to be "treated the same. . . .as other persons not so affected but similar in their ability or inability to work." The ghost of *Lochner* is particularly evident in cases brought and lost by pregnant women because, as one court said, "employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees."[75] Treating employees badly would not seem to be good policy. It evokes visions of the sweatshops of the early 1900s. Treating pregnant women badly also would not seem to be good policy. Even treating employees well, but ignoring any possibility that pregnancy and childbirth might create needs, such as time off and breastfeeding, that do not occur with any other condition, disadvantages women. One can see in these cases that while *Lochner* may have been overruled, its "rugged individualism" and its reluctance to have government interfere with employer decisions still lingers.

7.5 The Family and Medical Leave Act of 1993

Although the FLSA, passed in 1938, imposed wage and hour affirmative obligations on employers and Title VII, passed in 1964, imposed prohibitions, neither of those statutes required employers to provide maternity, paternity or sick leaves, or health insurance. No statute required employers to accommodate just one group of employees. That changed in 1990. Congress passed, and President George H.W. Bush signed, the Americans with Disabilities Act (ADA).[76] The ADA requires employers to make affirmative accommodations, even those that cost money, for disabled workers so that they can work. The ghost of *Lochner* was not vanquished entirely by the passage of the ADA, however. Two days after President George H.W. Bush signed the ADA in June of 1990, he vetoed the Family and Medical Leave Act (FMLA). He vetoed it again two years later. It was not until

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[75] Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir.1994)(holding that a woman suffering from morning sickness was fired for tardiness, not pregnancy); *See also* Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare*, 44 Vill. L. Rev. 355 (1999)(describing and critiquing many cases brought unsuccessfully under the PDA).

[76] 42 U.S.C. §12101, *et seq*.

after President Clinton was elected, that the FMLA was signed into law.[77] Perhaps the reason for President H.W. Bush's differing treatment of the two acts was that the ADA would enable those who are disabled to work and therefore, it would be hoped, stay off welfare and pay taxes, while the FMLA is about people on leave. Although those on leave are caring, without pay, for babies and the sick and elderly, they are not "working" for their employer. The Calvinistic "work ethic" of the United States' early settlers is an entrenched value as is the rugged individualist.

The FMLA was eventually enacted in 1993. It was the first act that President William Jefferson Clinton signed into law. It requires employers with 50 or more employees to provide up to 12 weeks of unpaid leave for the birth or adoption of a child, or to care for oneself or close family members with serious medical conditions.[78] These benefits may not seem like much to people from European Union countries, or from many other countries in the world, but as the history of social legislation in the United States illustrates, these benefits were a big step in the American context.

The policies of the FMLA received support from a surprising corner, the Supreme Court in an opinion written by the late Chief Justice Rehnquist, who is usually viewed as having been a conservative Justice. In *Nevada Department of Human Resources v. Hibbs*,[79] Chief Justice Rehnquist, writing for the Court, held that one purpose of the FMLA was to remedy sex discrimination caused by unequal family obligations.[80] Then he held that "state practices [which] continue to reinforce the stereotype of women as caregivers" such as denying men leaves comparable to those for women, discriminate on the basis of sex.[81] Finally he held that a statute that "simply mandated gender equality in the administration of leave benefits . . .would allow States to provide for no family leave at all. . . .such a policy would exclude far more women than men from the workplace . . ."[82] Thus he noted that an equal treatment policy, depending on the policy, can have unequal results. He did not need to address however, whether the FMLA can provide "special treatment" for women because that Act is written in gender neutral terms, with the hope that it will encourage men to seek family leaves.

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[77] *See* Linda Hamilton Krieger, *Forward – Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 Berkeley J. Emp. & Labor L. 1 (2000).
[78] 29 U.S.C. §2601, *et. seq*.
[79] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).
[80] Id. at 729
[81] Id. at 738.
[82] Id.

7.6 Conclusion

Supreme Court decisions demonstrate some of the values that compete when the United States enacts legislation that regulates the workplace. I would like to see the United States enact more "family friendly" legislation, borrowing from examples in the European Union as so many workers struggle in the United States to fulfill their family obligations without losing their jobs. The history set forth in this paper helps to explain why the United States has developed such an unusually strong reluctance to fund maternity and other family leaves. Greater exposure to European practices and integration with European law may soften this tradition.

Tracing the history of social legislation from wage and hour laws to the Family and Medical Leave Act through the eyes of the United States Supreme Court, shows how the United States has expanded its view of the government's role in the private workplace over time, but expansion in Europe has occurred much more quickly. Americans have a long tradition of opposing government power, particularly Federal power. This tradition has made American legislatures and courts resistant to social engineering. Family leave policies might seem to benefit all family members, but they still imply government activism. There are many sociological explanations for American attitudes, many of which have little to do with the law. Europeans have been more comfortable with government intervention, but this too may be changing. Some in the European Union may be questioning whether generous benefits help or hurt their economies. Economists may seek to compare the impact of governmentally funded, mandated leaves of the European Union with the unfunded few mandates of the United States. Determining which system is "best", however, requires recognizing that leave policies are not the only difference between the European Union and the United States, and that "best" can be measured in many different ways.

This discussion has sought to identify and explain some of the origins of American exceptionalism, and the gradual trend towards a more European model. Growing internationalization of the legal profession has made new legal models available to lawyers in Europe and in the United States. The law on both continents can only benefit from comparing our different experiences.